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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/566,086	04/20/2006	Rene Burgermeister	F8975	1012
28107 7590 05/11/2010 JORDAN AND HAMBURG LLP 122 EAST 42ND STREET SUITE 4000 NEW YORK, NY 10168				
EXAMINER BADR, HAMID R				
ART UNIT PAPER NUMBER 1781				
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

# Office Action Summary

**Application No.**

10/566,086

**Applicant(s)**

BURGERMEISTER ET AL.

**Examiner**

HAMID R. BADR

**Art Unit**

1781

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on RCE, 4/09/2010.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 13-18 and 20-29 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 13-18, 20-29 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/GS/US)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

### **DETAILED ACTION**

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 4/9/2010 has been entered.

1. Claims 13-18, and 20-29 are being considered on the merits.

### ***Objection to Claims***

Claim 1 is objected to for "in a rage of 0C and 6C". The word "rage" is misspelled. Correction is required.

### ***Claim Rejections - 35 USC § 112***

1. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claim 14 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. The claim addressing the cultivation of wild yeast through a natural inoculation from ambient air is

not enabling. Case law holds that applicant's specification must be "commensurately enabling [regarding the scope of the claims]" *Ex Parte Kung*, 17 USPQ2d 1545, 1547 (Bd. Pat. App. Inter. 1990). Otherwise **undue experimentation** would be involved in determining how to practice and use applicant's invention. The test for undue experimentation as to whether or not all compounds within the scope of claim 14 can be used as claimed and whether claim 14 meets the test is stated in *Ex parte Forman*, 230 USPQ 546, 547 (Bd. Pat. App. Inter. 1986) and *In re Wands*, 8 USPQ2d 1400, 1404 (Fed.Cir. 1988). Upon applying this test to claim 14, it is believed that undue experimentation **would** be required because:

(a) *The quantity of experimentation necessary* is **great** since claim 14 reads on using any wild yeast in the ambient air while the specification discloses baker's yeast. This would not be result in a repeatable, consistent method, given the variability of wild yeast.

(b) There is **no direction or guidance presented** for how to use ambient air to inoculate a farinaceous dough.

(c) There is an **absence of working examples** concerning inoculating a dough with wild yeast from ambient air. .

In light of the above factors, it is seen that undue experimentation would be necessary to make and use the invention of claim 14.

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. Claims 13-18 and 20-29 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.
4. Claim 13, 18, 23, 24 and 29 are indefinite for "thermally modified". The metes and bounds of the claim are unclear due to the recitation of the term 'modified'. It is unclear as to what type of modification is performed, what process steps are involved, and what end result is accomplished and encompassed by the term 'modified'.
5. Claim 13 is indefinite for "thick liquid to solid paste". It is unclear what is meant by this phrase. It is unclear how a liquid can be thick or a paste can be solid.
6. Claim 13 is indefinite for "pre dough concentrate". It is not clear whether the composition is a sponge as known in the art or some other form of bread dough.
7. Claim 13 is indefinite for "fermentation continues to a reduced extent". It is unclear whether the fermentation is continued at a reduced rate or the duration of fermentation is reduced to a finite period of time.
8. Claim 13 is also indefinite for "fermentation continues to a reduced extent". It is unclear whether the fermentation goes on for an infinite period of time.
9. Claim 15 and 16 and 25 and 26 recite the limitation "main fermentation" in claim 13 or 14. There is insufficient antecedent basis for this limitation in the claim.
10. Claim 17 and 27 recite the limitation "paste temperature" in claim 13. There is insufficient antecedent basis for this limitation in the claim.

11. Claim 17 is indefinite for "heated to 25C". It is not clear whether the dough is being heated using an external source of energy or the increase in temperature is due to the fermentation by yeast.
12. Claim 18 is indefinite for "blended to a thick-liquid to solid paste and fermented in a solid state fermentation". The fermentation of a liquid in a solid state fermentation is confusing and unclear.
13. Claim 21 is indefinite for "a fraction of 1.5 to 5 wt. % of the pre dough concentrate produced according to claim 13 or 29 is processed to form a final dough using wheat flour". It is not clear what is meant by "fraction". It is unclear whether the final dough contains the percentages of the pre-dough concentrate as claimed.
14. Claims 22, 23 and 24 are indefinite for "ground products". Claims 22, 23 and 24 recites the limitation "ground products" ultimately in claim 13. There is insufficient antecedent basis for this limitation in the claim.
15. Claim 22 is indefinite for "formally modified". It is not clear what is meant by this phrase. Should it be referring to a thermally modified product, then it will be indefinite as discussed for claims 13, 18, 23, and 24.
16. Claim 14 is indefinite for "which is inoculated naturally from the ambient air". It is unclear what is meant by the phrase. It is not clear what the applicant regards as the invention.
17. Claim 29 is indefinite for "a gluten content". It is unclear what is meant by "a".

***Claim Rejections - 35 USC § 103***

18. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

19. Claim 13-18 and 20-29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Domingues et al. (WO 93/01724; hereinafter R1) in view of Schou et al. (EP 0 152 943; hereinafter R2)

20. R1 discloses a refrigeratable yeast leavened dough composition and method of making the same.

21. R1 discloses that the ceased activity of the yeast at refrigeration temperatures will extend the storage of the dough at refrigeration temperatures as presently claimed.

22. R1 discloses that the yeast is rehydrated at a temperature of less than 10°C and mixed with flour, water etc. The dough may be proofed at elevated temperatures. After it has been cooled, the dough may be stored at refrigeration temperature for 90 days or more without any substantial likelihood of rupturing a container due to an increase in carbon dioxide pressure. (page 3, summary of invention).

23. R1 discloses a yeast-containing dough composition which can be refrigerated for extended periods of time. Such a composition includes dried yeast, chilled water, and flour. (page 4, first paragraph).

24. R1 discloses that the water is preferably added 0°C. The additional components of the dough can also be mixed with the yeast water slurry. Ingredients necessary to

achieve a desired texture or taste in the final cooked dough product may be added at this stage. (page 7, paragraph 2)

25. R1 teaches of storing the dough immediately at refrigeration temperature at 4C to 7.2 C which holds the yeast in an inactive state. (page 7, last paragraph). Alternatively the dough composition may be held at an elevated temperature for a predetermined period of time to permit the yeast to leaven the dough shortly after the dough composition has been mixed. Once the dough has been leavened, it may then be stored at refrigeration temperatures to hold the yeast in its inactive state. (page 8, first paragraph).

26. Given that the dough composition can be leavened at an elevated temperature for a predetermined amount of time, it is clear that the dough temperature will increase to the levels as presently claimed. The dough may then be refrigerated as disclosed by R1.

27. It is noted that claim 20, requires the production of a pre-dough concentrate (interpreted by the Examiner as a sponge dough) which is then mixed with flour and water to make a final dough for baking. Since the sponge method is known in the art, the dough composition as disclosed by R1 can be obviously made as a sponge dough and can be mixed with flour and water to make a dough for baking later.

28. While R1 discloses that other ingredients can be mixed with the yeast flour mixture, R1 is silent regarding the incorporation of a cooked flour product in the yeast-flour mixture.



29. R2 discloses a method of making bread where the cereal flour or mixture of flours is precooked by extrusion. The extrusion is carried out at temperature range of 150-180C. A composition is made from about 40% of rye meal and about 60% of wheat bran. (Abstract).

30. R2 teaches of a method in which a mixture of wheat flour (30%) and wheat bran (70%) is extruded at 150C. After the extrusion process, the mixture is pulverized in a mill. Rye meal is then mixed with more wheat flour, water, dough conditioner (acidifying agent), baker's yeast, and approximately 3% of the mixture baked into a bread. The mixture contains 10 parts by weight of the extruded, pulverized product. (Example 2, pages 5-6). Given that the process temperature is above the gelatinization temperature of starch, it is obvious that gluten in the thermally modified product will be denatured as presently claimed. It is also noted that the incorporation of the cooked flour product increases the water absorption rate of the flour into which the cooked product is incorporated. Therefore, depending on the desired level of water absorption, amount of the cooked pulverized product can be calculated and optimized as presently claimed. Increased water absorption will help the rehydration of the yeast as disclosed by R1.

31. Sponge and direct dough methods as presently claimed are also known in the art. Levels of incorporation of sponge into the final dough are also known in the art.

32. Therefore, it would have been obvious to one of ordinary skill in the art, at the time the invention was made, to make a sponge dough containing thermally processed cereal flour and refrigerate the sponge to lower the fermentation rate at low temperature of refrigeration as disclosed by R1. One would do so to be able to keep the sponge for a

longer period of time having controlled the fermentation. Absent any evidence and based on the combined teachings of the cited references, there would be a reasonable expectation of success in making such a sponge.

***Response to Arguments***

Applicants arguments have been reviewed thoroughly. These arguments are not deemed persuasive for the following reasons.

1. Applicants argue that the enablement rejection under 35 U.S.C 112 first paragraph is not a proper because there is no undue experimentation involved. To support this position, Applicants are presenting instructions on how to make a yeast starter from a web site.
  - a. Firstly, the specification itself, in light of the state of the art at the time the invention was made, should be enabling for what is claimed. It appears that there is not disclosure in the instant specification to enable the inoculation of wild yeast through ambient air. If there were such a disclosure, it is unclear as to why it was necessary to present some instructions from a web site.
  - b. The subject matter as presented by the Applicants (through a web site) is not scientifically sound. It is scientifically established that a spontaneous fermentation of a mixture of flour and water takes place at ambient temperature due to the action of wild yeasts and lactic acid bacteria already contained in the cereal flour. Such a fermentation has been known by man for hundreds of years. However, the sour dough is prepared when the right proportions of flour and water are mixed and kept at a proper temperature regardless of being exposed to ambient air or to vacuum.

c. In their most recent arguments Applicants state that " A patent need not teach and preferably omits what is well known in the art." Therefore, their specification is omitting the air inoculation of wild yeast.

The method the Applicants are referring to is not well known in the art. The method the Applicants are referring to is not a scientifically sound method of making use of wild yeasts. As stated by the Examiner, it is believed that the wild yeasts exist in the flour and will be activated when environmental conditions allow.

2. Applicants arguments regarding the final Office action is moot due to the amendments made after the final rejection and the new grounds of rejection set forth in this Office action.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to HAMID R. BADR whose telephone number is (571)270-3455. The examiner can normally be reached on M-F, 8:00-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Hamid R. Badr  
Examiner  
Art Unit 1781

/Keith D. Hendricks/

Supervisory Patent Examiner, Art Unit 1781